UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
	:	
v.	:	Criminal No. 3:98 CR 238 (CFD)
	:	Civil No. 01CV1294(CFD)
ANDRE L. DAVIS	:	

RULING

Pending is the petitioner's Motion to Vacate and Re-Sentence Under 28 U.S.C. § 2255 [Doc. #136]. For the following reasons, the motion is DENIED.

I. Background and Chronology[1]

On November 24, 1998, the petitioner, Andre Davis, was arrested by officers of the Wallingford Police Department following a traffic stop. The officers found marijuana, counterfeit credit and identification cards, counterfeit U.S. currency, and a firearm in Davis' vehicle. Davis was taken into state custody on various state criminal charges, including credit card theft, forgery, criminal impersonation, carrying a firearm without a permit, and possession of marijuana.

On December 3, 1998, Davis was indicted by a federal grand jury for possession of ammunition by a convicted felon in violation of 18 U.S.C. § 922(g) on the basis of the November 24, 1998 incident. On February 2, 1999, the grand jury returned a superseding indictment which charged Davis with conspiracy to commit credit card fraud (Count One), credit card fraud (Count Two), possession of counterfeit obligations or securities of the United States (Counts Three and Four), and possession of ammunition by a convicted felon (Count Five), in violation of 18 U.S.C. §§ 1029(b)(2),

[1]The following facts are undisputed in the petitioner's motion and supporting papers.

1029(a)(2), 472, and 922(g).[2]

On June 7, 2000, Davis entered a plea of guilty before this Court to Count Five of the superseding indictment for possession of ammunition by a felon. On June 14, 2000, Davis was sentenced in state court to one year imprisonment for possession of marijuana in connection with his November 24, 1998 arrest. On June 15, 2000, the day after his sentencing on the state marijuana conviction, Davis was turned over to the United States Marshal's Service by the Connecticut authorities. On September 8, 2000, this Court sentenced Davis to sixty-five months imprisonment on the ammunition charge, and he is presently serving his federal sentence.[3]

On January 11, 2001, the Federal Bureau of Prisons determined that Davis commenced his federal sentence on June 15, 2000. On July 10, 2001, Davis filed this motion to vacate and re-sentence, pursuant to 28 U.S.C. § 2255, claiming that the time he served in state custody from November 24, 1998 to June 14, 2000 should have been credited toward his federal sentence by the Bureau of Prisons. Davis requests re-sentencing by this Court to reduce the original sentence by the period he spent in state custody from November 24, 1998 to June 14, 2000, approximately eighteen months.

II. Discussion

The Government characterizes Davis' claim as a review of the Bureau of Prisons' determination

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[2]After the return of the superseding indictment, on December 18, 1998, the defendant was charged by state authorities in Orange, Connecticut with forgery in the fifth degree in an apparently unrelated matter. He was sentenced to time served on this charge on May 17, 1999.

[3]In May 2001, the United States Court of Appeals for the Second Circuit affirmed the judgment of conviction by summary order.

of when his federal sentence commenced and whether Davis should receive credit for time spent in custody before his federal sentence commenced.[4] To this claim, the Government correctly argues that "after a defendant is sentenced, it falls to the BOP [Bureau of Prisons], not the district judge, to determine when a sentence is deemed to commence." United States v. Labeille-Soto, 163 F.3d 93, 98 (2d Cir. 1998) (internal quotation marks and citation omitted). Accordingly, the Government argues, the defendant's failure to exhaust administrative remedies within the Bureau of Prisons and 18 U.S.C. § 3585 precludes the Court's review of this claim.

In his August 1, 2001 reply to the Government's response, however, Davis emphasizes that his argument is not merely a dispute over the Bureau of Prisons' determination of credit. Rather, he argues, his one year state sentence for possession of marijuana was an undischarged term of imprisonment under § 5G1.3 of the United States Sentencing Guidelines that should have been taken into account in his sentencing on the federal ammunition charge.

As an initial matter, it is important to note that Davis' state sentence for possession of marijuana

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[4]18 U.S.C. § 3585 governs such computations and provides:

> (a) Commencement of sentence.--A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.
> (b) Credit for prior custody.--A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences--
>
> (1) as a result of the offense for which the sentence was imposed; or
> (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;
>
> that has not been credited against another sentence.

18 U.S.C. § 3585.

was *discharged* at the time his federal sentence commenced. As noted above, the Connecticut Superior Court sentenced Davis to one year imprisonment on June 14, 2000 for the marijuana charge arising from the November 24, 1998 arrest. His sentence on the unrelated state forgery charge expired on May 17, 1999 when he was then sentenced to time served. Thus, the period Davis served on the state marijuana conviction was from May 17, 1999 to June 14, 2000, and he had completed his sentence on the marijuana conviction as of June 14, 2000 when he was then sentenced by the Superior Court. It was not until September 8, 2000 that he was sentenced on the federal charge.[5] "If the defendant has completed his state prison term before the federal sentence is imposed, § 5G1.3 does not apply, and his federal prison term cannot be imposed concurrently." United States v. Labeille-Soto, 163 F.3d 93, 99 (2d Cir.1998); see also United States v. Fermin, 252 F.3d 102, 106 n.5. (2d Cir. 2001).

Notwithstanding that the state marijuana sentence was discharged at the time of the federal sentencing, however, the Court would have had the authority to depart downward if the discharged term of imprisonment resulted from an offense that was fully taken into account in the determination of the offense level for the federal ammunition conviction. On November 1, 2002, the Sentencing Commission added an application note to U.S.S.G. § 5G1.3 which now permits a downward departure for this circumstance. That note provides:

> In the case of a discharged term of imprisonment, a downward departure is not prohibited if subsection (b) would have applied to that term of imprisonment had the term been undischarged. Any such departure should be fashioned to achieve a reasonable punishment for

[5]There is no dispute that Davis received credit on his federal sentence for the time from June 15, 2000 to his federal sentencing date of September 8, 2000.

the instant offense.

Application Note 7; see also United States v. Rosado, —F. Supp. 2d —, 2003 WL 57005, at *3 (S.D.N.Y. Jan. 7, 2003). Although the application note was adopted after the sentencing here, several circuit courts had endorsed departures in such circumstances before the change. See United States v. Otto, 176 F.3d 416, 418 (8th Cir. 1999); United States v. O'Hagan, 139 F.3d 641, 657-58 (8th Cir. 1998); United States v. Blackwell, 49 F.3d 1232, 1241 (7th Cir. 1995).

Here, however, Davis' prior state conviction for marijuana possession was not taken into account in the calculation of the offense level for his federal sentence on the ammunition conviction. Davis was not charged with possession of marijuana in the indictment or superseding indictment, and it was not considered relevant offense conduct in the determination of his guidelines range. Accordingly, the Court did not have the authority to depart to account for Davis' discharged term of imprisonment for his marijuana conviction on that basis. But see United States v. Newby, 13 Fed. Appx. 324 (6th Cir. 2001) (unpublished opinion).

Furthermore, though a downward departure to account for time already served may be warranted in some other circumstances under § 5K2.0 of the Sentencing Guidelines, Davis has not identified any "'aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission.'" U.S.S.G. § 5K2.0 (quoting 18 U.S.C. § 3553(b)). Nor has Davis indicated that any aspects of his case are "unusual enough ... to fall outside the heartland of cases in the Guideline." Fermin, 252 F.3d at 111 n. 16 (quoting Koon v. United States, 518 U.S. 81, 98 (1996)) (internal quotation marks omitted).

Such a downward departure may be warranted for "a period of time during which an alien is

incarcerated solely due to the federal government's delay in transferring him to federal custody and for which the alien does not receive credit toward his sentence." United States v. Montez-Gaviria, 163 F.3d 697, 702 (2d Cir.1998); see also Labeille-Soto, 163 F.3d at 101 (suggesting that a sentencing court could grant a downward departure to address time already served on a preexisting state sentence); Garcia-Hernandez, 237 F.3d at 107 n.1 (approving downward departure where the time that the appellant spent in pre-sentencing federal detention was "effectively uncredited" toward either the state or federal sentence). Here, all but one month of Davis' time in state custody from November 1998 to June 2000 was credited on the Orange forgery conviction or the marijuana conviction. As noted, Davis was sentenced to time served for the Orange forgery conviction on May 17, 1999 and received a sentence of one year–in effect, time served–for the marijuana conviction on June 14, 2000. Accordingly, the Court concludes that it did not have the authority to depart to account for this short period of uncredited time absent other factors. Cf. United States v. Los Santos, 283 F.3d 422, 428 (2d Cir. 2002) (government's four month delay in prosecuting defendant did not take case out of heartland).

Additionally, though the state marijuana conviction arose out of the same factual circumstances as the federal charges and conviction–the November 24, 1998 traffic stop–that alone is not sufficient to provide a basis under § 5K2.0 of the Guidelines for a downward departure. The marijuana conviction was an offense separate from the federal charges and justified the additional penalty imposed by the state court. Absent other circumstances, a downward departure would not be permitted. But see Newby, 13 Fed. Appx. 324 (6th Cir. 2001).

Finally, though the information regarding the marijuana conviction may have been relevant to the

Court's determination of where in the applicable range to sentence Davis,[6] the Court lacks the authority to resentence Davis under either 18 U.S.C. § 3582 or Rule 35 of the Federal Rules of Criminal Procedure. Section 3582 provides, in relevant part:

> (b) Effect of finality of judgment.--Notwithstanding the fact that a sentence to imprisonment can subsequently be--
> (1) modified pursuant to the provisions of subsection (c);
> (2) corrected pursuant to the provisions of Rule 35 of the Federal Rules of Criminal Procedure and section 3742; or
> (3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;
> a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.
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> (c) Modification of an imposed term of imprisonment.--The court may not modify a term of imprisonment once it has been imposed except that--
> (1) in any case--
> (A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment . . . , after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that--
> (i) extraordinary and compelling reasons warrant such a reduction; or
> (ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);
> and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and
>
> (B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal

[6]The Guidelines range was 57-71 months; Davis received a sentence of 65 months.

Rules of Criminal Procedure; and

> (2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

First, as to subsection b(2), Rule 35 only applies where the court within seven days after sentencing corrects an arithmetical, technical, or other clear error, or where the government moves within one year after sentencing for a reduction due to the defendant's substantial assistance. See Fed. R. Crim. P. 35. As none of these circumstances is present here, subsection b(2) does not apply. Second, subsection (c)(1)(A) does not apply because Davis, rather than the Bureau of Prisons, brought this motion to reduce sentence. Third, as stated above, the Guidelines do not permit a modification of Davis' term of imprisonment, and Rule 35 does not apply, and thus, subsection (c)(1)(B) does not apply. Finally, because Davis' range under the Guidelines has not been changed, subsection (c)(2) does not apply. Accordingly, this Court lacks the authority to resentence Davis within the range in which he was sentenced.

III. Conclusion

For the preceding reasons, the petitioner's Motion To Vacate and Re-Sentence Under 28 U.S.C. § 2255 [Doc. #136] is DENIED. A certificate of appealability will not issue, as Davis has failed to make a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2); cf. United States v. Walters, 47 Fed. Appx. 100, 2002 WL 31059155, at **2 (3d Cir. Sept 17.

2002) (unpublished opinion) (petitioner's claim that sentencing court misapplied Sentencing Guidelines did not present a constitutional issue sufficient for grant of certificate of appealability); United States v. Cepero, 224 F.3d 256, 267-68 (3d Cir. 2000) (same).

SO ORDERED this ____ day of May 2003, at Hartford, Connecticut.

CHRISTOPHER F. DRONEY
UNITED STATES DISTRICT JUDGE